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**IN THE  
COURT OF APPEALS OF INDIANA**

DAVID WILLIAM TITLEY,  
Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 48A02-0609-CR-788

APPEAL FROM THE MADISON SUPERIOR COURT  
The Honorable Thomas Newman, Jr., Judge  
Cause No. 48D03-0604-FB-146

**April 18, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

David Titley appeals the sentence he received following his conviction of five counts of Child Molesting,<sup>1</sup> three as class B felonies and two as class C felonies. Specifically, Titley presents the following restated issues with respect to his sentencing:

1. Did the trial court err in identifying and weighing aggravating and mitigating circumstances?
2. Did the trial court violate Titley's Sixth Amendment rights by enhancing his sentence based upon aggravating factors not admitted by him or found by a jury?
3. Was Titley's sentence inappropriate?

We affirm.

The relevant facts are that Titley was married to Dorothy, who had three children, including S.M., who was under the age of fourteen when Titley molested her. The molestations occurred between January 1, 2003 and February 9, 2005. In pleading guilty, Titley admitted that between those dates, he committed the following acts: (Count I) he performed oral sex upon S.M.; (Count II) he inserted his finger in S.M.'s vagina; (Count III) he forced S.M. to perform oral sex on him; (Count IV) he fondled S.M.'s breasts in a sexual manner; and (Count V) he forced S.M. to touch his penis.

At a June 19, 2005 guilty plea hearing, Titley admitted committing the foregoing acts and pled guilty to the above-listed five counts of child molesting. The trial court accepted the plea and set the matter for sentencing. On July 5, 2005, the trial court sentenced Titley to the maximum twenty years for each of the B-felony convictions and

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<sup>1</sup> Ind. Code Ann. § 35-42-4-3 (West, PREMISE through 2006 Second Regular Session).

the maximum eight years for each of the C-felony convictions. The court ordered the three twenty-year sentences to be served concurrent to one another, but consecutive to the two eight-year sentences, which would be served concurrent to one another. The result was a twenty-eight-year executed sentence. Titley appeals that sentence on multiple grounds.

We note as a preliminary matter that Titley's crimes were committed between January 2003 and February 9, 2005. Those dates are significant because Titley's challenges all center upon his sentence. After Titley committed those offenses, the Legislature amended Indiana's sentencing statutes to, among other things, provide for "advisory sentences" rather than "presumptive sentences." See Pub.L. No. 71-2005, §5 (codified at Ind. Code Ann. § 35-50-2-1.3 (West, PREMISE through 2006 Second Regular Session)). The new scheme changes the law applicable to the issues Titley presents. If those changes are deemed substantive in nature, they may not be applied retroactively. *Weaver v. State*, 845 N.E.2d 1066 (Ind. Ct. App. 2006), *trans. denied*. Procedural changes, however, may be applied retroactively.<sup>2</sup> *Id.* Several panels of this court have addressed the question of whether the changes are procedural or substantive, and the decisions cut both ways. See *Creekmore v. State*, 853 N.E.2d 523 (Ind. Ct. App. 2006) (the changes are substantive and thus may not be applied retroactively), *clarified*

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<sup>2</sup> An amendment is "procedural in nature for purposes of the ex post facto doctrine, and may be applied to crimes committed before the effective date," if it "neither changes the elements of the crime nor enlarges its punishment." See *Ritchie v. State*, 809 N.E.2d 258, 264 (Ind. 2004), *cert. denied*, 126 S.Ct. 42 (2005).

*on denial of reh’g*, 858 N.E.2d 230; *but see Samaniego-Hernandez v. State*, 839 N.E.2d 798, 805 (Ind. Ct. App. 2005) (“this change in the statute is procedural rather than substantive”). We agree with the line of reasoning expressed in *Creekmore*, i.e., that the new scheme does not apply to cases in which the offense was committed before the effective date of the amended statute, i.e., April 25, 2005. The following analysis proceeds on that conclusion.

1.

Titley contends the trial court erred in identifying and weighing aggravating and mitigating circumstances. Specifically, he contends the trial court failed to find and properly weigh three mitigating circumstances, and relied upon improper aggravating circumstances. We will discuss the propriety of the aggravating circumstances in Issue 2 below. With respect to mitigating circumstances, the court found only one – the fact that Titley pled guilty, thus relieving the State of the time and expense of presenting a case at trial, and also relieving the victim of the trauma of testifying. Titley contends the trial court failed to accord his guilty pleas sufficient weight, and also failed to find as mitigators his lack of criminal history and his remorse.

A sentencing court must consider all evidence of mitigating factors presented by a defendant, but the finding of mitigating circumstances is committed to the trial court’s sound discretion. *Creekmore v. State*, 853 N.E.2d 523. The trial court is not required to consider alleged mitigating circumstances that are highly disputable in nature, weight, or significance. *Id.* Moreover, a sentencing court need not agree with the defendant’s

assessment of the weight or value to be given to proffered mitigating facts. *Id.* “Neither is the trial court obligated to explain why it did not find a factor to be significantly mitigating.” *Id.* at 530. “‘Indeed, a sentencing court is under no obligation to find mitigating factors at all.’” *Id.* (quoting *Newsome v. State*, 797 N.E.2d 293, 301 (Ind. Ct. App. 2003)), *trans. denied*. To support an allegation that the trial court failed to identify or find a mitigating factor, the defendant must establish that the mitigating evidence was both significant and clearly supported by the record. *Matshazi v. State*, 804 N.E.2d 1232 (Ind. Ct. App. 2004), *trans. denied*.

Titley contends the trial court erred in failing to find his lack of criminal history as a significant mitigating circumstance. We note first that the crimes to which Titley pled guilty involved multiple acts over a period of two years. That in itself greatly negates the claim that he is entitled to sentence mitigation because he has heretofore and otherwise lived a law-abiding life. The State presented evidence that Titley was charged with other offenses involving not only S.M. as a victim, but others as well, and that those charges were dismissed as a result of the plea agreement. Moreover, Titley admitted that he previously was charged with the offense of contributing to the delinquency of a minor, but that the charge was dismissed upon his completion of a diversion program. The trial court did not err in failing to find Titley’s lack of criminal history as a significant mitigating circumstance.

Titley contends the trial court erred in failing to find his guilty plea as a significant mitigator. Our Supreme Court has determined that the significance of a guilty plea as a

mitigating factor may vary from case to case. *See Francis v. State*, 817 N.E.2d 235 (Ind. 2004). In that regard, it is well established that a guilty plea is not significantly mitigating where the defendant has received a substantial benefit from it or where the evidence of guilt is such that the decision to plead guilty is merely a pragmatic one. *See Wells v. State*, 836 N.E.2d 475 (Ind. Ct. App. 2005), *trans. denied*. In pleading guilty, Titley benefited substantially from the dismissal of one class C felony charge and one class D felony charge. Thus, although the plea did indeed save money and time for the State and spare the victim from the ordeal of testifying at trial, the trial court would be justified in determining that the decision to plead guilty appears to have been to a large extent pragmatic, and thus entitled to minimal mitigating weight.

Lastly with respect to this issue, Titley contends the trial court erred in failing to find his remorse as a mitigating circumstance. The trial court was able to observe Titley first-hand at the sentencing hearing, and on that basis alone is a much better judge than we are of his demeanor and the sincerity of his expression of remorse. *See Wilkie v. State*, 813 N.E.2d 794 (Ind. Ct. App. 2004), *trans. denied*. Moreover, we note that the trial court had the benefit of the presentence report in sentencing Titley. In that report, the preparer noted,

While interviewing the defendant, he showed no visible remorse and even though he had plead [sic] guilty to the Instant Offenses, while giving his version he seemed to take no responsibility for his actions in the crime itself stating that ‘She solicited me’ and that ‘I never wanted her to be my girlfriend’ when referring to [S.M.] a 9 year old girl and the victim in the Instant Offense.

*Appellant's Appendix* at 20. In view of that observation and the remote vantage point from which we consider the matter, we will not disturb the trial court's determination that remorse is not a mitigating circumstance in this case. *See Ousley v. State*, 807 N.E.2d 758 (Ind. Ct. App. 2004).

2.

Titley contends the trial court erred in finding aggravating circumstances. His claims in this regard may be grouped into two categories. First, he contends that some of the aggravators are simply improper, either because they constitute material elements of the offenses of which he was convicted, or because they find no support in the evidence. In context, it is clear that this challenge does not constitute a *Blakely* claim, although the claim would fail even on that basis. Second, Titley contends that one of the aggravators found by the trial court violates *Blakely v. Washington*, 542 U.S. 296 (2004).

The imposition of enhanced and consecutive sentences was accompanied by the following sentencing statement:

Court finds the aggravating circumstances to be the high degree of betrayal of trust in this case in which the victim was the step-daughter of the defendant, the activities included various sexual types of activities and the young nature of the victim in this case being seven (7) to nine (9) years old, the uncharged misconduct is testified to by Captain Caldwell indicating the threats to the children – to the child here and others in regard to retaliation which goes to the character of the defendant indicating a bad character and also justifying an enhanced sentence.

*Transcript* at 51. Thus, the four aggravators identified by the court were (1) the betrayal of trust involved because the victim was Titley's stepdaughter, (2) the uncharged

misconduct involving other victims, and threats made against all of the victims to secure their silence, (3) the young age of the victim (seven to nine years old), and (4) Titley engaged in a variety of sex acts with the victim.

Titley contends (3) and (4) above were improper aggravators because they constitute material elements of the offenses. With respect to (3), concerning the age of the victim, the statute under which Titley was convicted begins, “A person who, with a child under fourteen (14) years of age”. I.C. § 35-42-4-3. Thus, the victim’s age of fourteen is a material element of the offense. In this case, however, S.M. was considerably younger than that, i.e., between seven and nine years old at the time of the molestations. Our courts have “held that a court may consider extreme youth as an aggravating factor even where the age of the victim is an element of the offense.” *Brown v. State*, 760 N.E.2d 243, 246 (Ind. Ct. App. 2002) (statute defined an upper age limit of fourteen, and the victim of molestation was seven years old), *trans. denied*; *see also* Ind. Code Ann. § 35-38-1-7.1(a)(3). The trial court did not err in finding the victim’s age as an aggravating circumstance.

The trial court found as an aggravating circumstance that Titley engaged in a variety of types of sexual activity with the victim. Although not so stated, we interpret this to fit within the category of aggravating factors referred to as “circumstances of the offense.” This is a valid aggravator pursuant to I.C. § 35-38-1-7.1(a)(2). In this case, we believe the court is commenting not only upon the fact that Titley molested S.M. in a variety of different ways, but also that he did so over a prolonged period of time. Thus,



the “circumstance” to which this refers is, we conclude, the long-term, serial nature of the offenses. Titley performed multiple acts of molestation upon S.M. over a period of two years, and there was evidence that such included other acts that did not form the basis of any of his convictions. This is a valid aggravating circumstance.

We turn now to aggravator (1), i.e., the betrayal of trust involved because the victim was Titley’s stepdaughter. Titley’s claim with respect to this aggravator is unclear. He states, “Here, the court enhanced the sentence on the ground that Titley was both in a position of trust and the victim’s step-father. It as [sic] no supported [sic] by reference to an admitted fact and therefore could not serve as a separate aggravating circumstance.” *Appellant’s Brief* at 12. We cannot tell whether Titley is challenging the proof that S.M. was his stepdaughter, or whether he is challenging the finding that he occupied a position of trust with respect to her. Neither claim has merit.

At the sentencing hearing, and before sentence was pronounced, Titley made the following comment: “... [Y]ou know, trying to make the best with what I had and I wanted to apologize to my stepdaughter, [S.M.], and let her know, not to feel bad about what’s happened.” *Transcript* at 23. Thus, Titley admitted S.M. was his stepdaughter. As to the second part, being in a position of trust with the victim is a valid aggravating circumstance. *Hart v. State*, 829 N.E.2d 541 (Ind. Ct. App. 2005). Titley certainly occupied a position of trust relative to S.M., in that he was her step-father and she was nine years old or younger and lived with him during the time the molestations occurred.

*See McCoy v. State*, 856 N.E.2d 1259 (Ind. Ct. App. 2006). This was a valid aggravating circumstance.

Titley contends aggravator (2), pertaining to uncharged misconduct and threats made against all of the victims to secure their silence, violates the sentencing rule announced in *Blakely v. Washington*, 542 U.S. 296. The rule to which he refers provides that a trial court may not enhance a sentence based upon an aggravating factor that was neither found by a jury nor admitted by the defendant. Titley is correct: the challenged aggravator was invalid under *Blakely* in that it was not found by a jury and he did not admit it.

“‘Where we find an irregularity in a trial court’s sentencing decision, we [may] remand to the trial court for a clarification or new sentencing determination, [] affirm the sentence if the error is harmless, or [] reweigh the proper aggravating and mitigating circumstances independently at the appellate level.’” *Baber v. State*, 842 N.E.2d 343, 345 (Ind. 2006) (quoting *Cotto v. State*, 829 N.E.2d 520, 525 (Ind. 2005)). We opt for the latter option here.

3.

Titley contends his sentence was inappropriate. We may revise a sentence if, after considering the trial court’s decision, we conclude the sentence is inappropriate in light of the nature of the offense and character of the offender. Ind. Appellate Rule 7(B). In the instant case, the trial court identified four aggravators, one of which we vacated pursuant to *Blakely*. Thus, Titley’s enhanced, consecutive sentences are based upon the following

valid aggravators: 1) The young age of the victim, (2) the betrayal of trust involved because the victim was Titley's stepdaughter, and (3) the circumstances of the crimes, i.e., that Titley engaged in a variety sex acts with the victim over an extended period of time. Balanced against these aggravators is one mitigator, i.e., Titley's entry of a guilty plea, which was not accorded significant weight by the trial court.

We find that all three aggravators are entitled to moderate to high weight. Titley's prolonged and varied abuse of his young stepdaughter is particularly disturbing and reveals a depravity of character warranting an enhanced incarceration. Moreover, we agree with the trial court's determination that the proffered mitigator is, on the facts of this case, entitled to little weight. Agreeing with the trial court's rationale at sentencing except with respect to the improper aggravator, we also find ourselves in agreement with its result. Therefore, we affirm the sentence imposed by the trial court.

Judgment affirmed.

RILEY, J., concurs.

KIRSCH, J., concurs in result without separate opinion.